

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
v.)	Docket No. 98-316-P-C
)	(Criminal No. 97-5-P-C)
ARTHUR J. MOLLO, III,)	
)	
Defendant)	

**RECOMMENDED DECISION ON DEFENDANT’S MOTION FOR
COLLATERAL RELIEF PURSUANT TO 28 U.S.C. § 2255**

The defendant moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. A sentence of 156 months was imposed after he pleaded guilty to a charge of being a felon in possession of a firearm, a violation of 18 U.S.C. § 922(g)(1). Judgment (Docket No. 18) at 1-2. The defendant was sentenced as an armed career criminal. Transcript of Proceedings (Docket No. 21) at 20. His sentence was subsequently reduced, upon motion of the government, Docket No. 33, to a term of 78 months, Reduction of Judgment in a Criminal Case (“Amended Judgment”) (Docket No. 34) at 2. The defendant now contends that he was illegally sentenced as an armed career criminal because one of the state court convictions upon which that status was based had no factual basis and “is now under attack in the State District Court in Connecticut.” Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket No. 35) at [3].

A section 2255 motion may be dismissed without an evidentiary hearing if the “allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because ‘they are contradicted by the record, inherently incredible, or conclusions rather than

statements of fact.’’ *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citations omitted).

In this instance, the defendant’s allegations, accepted as true, would not entitle him to relief.

Accordingly, I recommend that the motion be denied without an evidentiary hearing.

In its initial sentencing of the defendant, the court found that he was an armed career criminal within the meaning of § 4B1.4 of the United States Sentencing Commission Guidelines (“U.S.S.G.”), resulting in an increase in the applicable base offense level from 24 to 33. Memorandum of Sentencing Judgment (Docket No. 17) at 1. The base offense level was then decreased to level 30 pursuant to U.S.S.G. § 3E1.1(a) and (b), pursuant to a finding that the defendant had accepted responsibility for the offense. *Id.* at 2. The guideline range for sentencing purposes (offense level 30, criminal history category VI) was therefore 180 to 210 months. *Id.* The court found that a downward departure from the guideline range was justified under U.S.S.G. § 5K1.1 and imposed a sentence of 156 months. *Id.* at 4. If the defendant had not been sentenced as an armed career criminal, the applicable guideline range would have been 77 to 96 months (offense level 21, criminal history category VI). U.S.S.G. Sentencing Table, Ch. 5 Pt. A.

Eleven months after the defendant was sentenced, the government moved pursuant to Fed. R. Crim. P. 35 and 18 U.S.C. § 3553 for a further reduction in the defendant’s sentence. Docket No. 33. The motion was granted and the defendant’s sentence was reduced to 78 months. Amended Judgment at 2. It is therefore apparent that the defendant’s current sentence is only one month in excess of the minimum term to which he could have been sentenced if he had not been found to be an armed career criminal.

It is not necessary to decide the question whether this minimal difference in possible sentencing justifies section 2255 relief in this case because, in any event, the defendant’s motion is

premature. He is not entitled to relief from the finding that he is an armed career criminal based on the fact that a state-court conviction used to determine that status is invalid unless and until the state court involved has vacated that conviction. *See United States v. Pettiford*, 101 F.3d 199, 201-02 (1st Cir. 1996); *cf. United States v. Kahoe*, 134 F.3d 1230, 1234-35 (4th Cir. 1998) (defendant not entitled to section 2255 relief from sentencing court's finding of armed career criminal status even when underlying conviction subsequently vacated). *See also United States v. Acosta*, 861 F.Supp. 1, 3 (D.R.I. 1994) (filing of post-conviction attack on predicate conviction does not render that conviction nonfinal for sentencing purposes). Here, the defendant has asserted, without any documentary support or citation to the particular court and docket number where the state-court conviction is supposedly under attack, only that the underlying conviction is now being challenged. It is entirely possible that the conviction will not be overturned. The defendant is not entitled to section 2255 relief at this time on the basis of an event that may never occur.

For the foregoing reasons, I recommend that the defendant's motion to vacate, set aside or correct his sentence be **DENIED** without a hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 5th day of November, 1998.

David M. Cohen
United States Magistrate Judge